UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 202

Docket No. DC-0752-09-0540-I-1

Barbara J. Loggins,

Appellant,

v.

United States Postal Service,

Agency.

October 8, 2009

Brad M. Bowman, Esquire, Atlanta, Georgia, for the appellant.

Karla M. Malone, Esquire, Landover, Maryland, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant filed a petition for review of an initial decision that dismissed her appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the petition for review, VACATE the initial decision, and REMAND the case to the Washington Regional Office for further adjudication.

BACKGROUND

¶2 The appellant, a preference eligible Carrier Technician, filed an occupational disease claim with the Office of Workers' Compensation Programs (OWCP) in May 2000, based on a diagnosed condition of osteoarthritis. Initial

Appeal File (IAF), Tab 1 at 1, 5, Tab 5, Subtabs A-B, Tab 6 at 25. OWCP accepted the appellant's claim, and on February 15, 2001, she accepted the agency's offer of a limited duty position as a PS 2/C Letter Carrier. IAF, Tab 5, Subtabs B-C. Eight years later, on April 16, 2009, the agency asked the appellant to provide medical documentation indicating that she had "reached [her] maximum medical improvement" or that she would "be able to resume full duties of [her] assignment within the next six months." *Id*., Subtab E (emphasis omitted). The agency also advised the appellant that it might "re-post the assignment for bid and [she would] become unassigned," if she was unable to affirm that she would be able to perform within 6 months all of the duties of her bid assignment. *Id*.

¶3 In response, the appellant gave the agency two letters from her physician. IAF, Tab 6 at 24-25. The physician indicated that the appellant's condition was chronic and incurable, and recommended specific "permanent" restrictions on her job duties. *Id*. at 25. The appellant alleges that, upon receipt of her medical documentation, the agency said she was unable to perform her bid assignment and that it was going to re-post her assignment for bid. IAF, Tab 5 at 5. The appellant also alleges that the agency informed her that she was being removed from her bid assignment. *Id*.

¶4 On May 11, 2009, the appellant challenged her "[r]emoval from assignment," in an appeal to the Board. IAF, Tab 1 at 3. She also indicated on her appeal form that she was a preference eligible, checked a box indicating that she was filing a veterans' preference claim, and completed the section of the appeal form related to veterans' preference claims under the Veterans Employment Opportunities Act of 1998 (VEOA). *Id*. at 1, 4.

¶5 The administrative judge issued a show-cause order and informed the appellant that the Board may not have jurisdiction over her appeal because it appeared that the agency had not yet taken the action the appellant was trying to appeal and, generally, the Board does not have jurisdiction over an employee's

placement in an "unassigned status." IAF, Tab 3 at 1. The administrative judge also notified the appellant that the Board might have jurisdiction over her appeal "[i]f, however, the agency's action amount[ed] to a constructive suspension for more than 14 days," and ordered the appellant to submit evidence and argument to prove jurisdiction. *Id*. at 1-2.

¶6 The day after the administrative judge issued the show-cause order, the agency offered the appellant another limited duty assignment as a PS 1/O Letter Carrier, with a salary equal to the appellant's base salary as a PS 2/O Carrier Technician. IAF, Tab 6 at 22, 41. In addition, the stated duties of the PS 1/O Letter Carrier assignment were very similar to the stated duties of her former PS 2/C limited duty assignment. *Compare* IAF, Tab 6 at 22 *with* IAF, Tab 5, Subtab C. The appellant accepted the agency's offer on May 21, 2009, but she wrote "I sign under protest" above her signature. IAF, Tab 6 at 22.

¶7 The appellant contended, in her subsequent response to the show-cause order, that she accepted the PS 1/O Letter Carrier position under duress. IAF, Tab 5 at 5. She claimed that the agency told her that she "was being removed from [her] bid assignment" and, if she did not accept the agency's limited duty assignment, the agency would inform OWCP that she "declined a job offer and [her] case would be closed." *Id*. The appellant also claimed that the agency made her an "unassigned regular" in violation of the agency's obligations under 5 C.F.R. § 353.301(c), which pertains to the restoration rights of individuals who are physically disqualified from their former positions because of a compensable injury. IAF, Tab 5 at 5-6, Subtab I. The agency filed a motion to dismiss the appeal for lack of jurisdiction. IAF, Tab 6.

¶8 Upon reviewing the parties' submissions, the administrative judge dismissed the appeal for lack of jurisdiction based on the written record. IAF, Tab 7, Initial Decision (ID). The administrative judge found that the appellant had failed to allege any facts or submit any evidence indicating that she was constructively suspended or reduced in grade or pay. ID at 4. The administrative

judge also found the appellant "did not allege that her rights as a preference eligible employee [were] violated." ID at 3.

¶9 The pro se[1] appellant has filed a petition for review contending that the Board has jurisdiction over her appeal because the record shows that the agency demoted her from a Grade 2 Letter Carrier Technician to an "unassigned regular," Grade 1 Letter Carrier. PFR File (PFRF), Tab 1 at 7. She also contends that the agency violated the Veterans' Preference Act "by reducing [her] in grade and/or pay," and asks the Board "to restore [her] to [her] assignment with [her] original, Limited Duty Job Offer." *Id.* The agency has filed a timely response opposing the petition for review.[2] PFRF, Tab 3.

ANALYSIS

¶10 The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). Appealable adverse actions include removal, reduction in grade, reduction in pay, suspension for more than 14 days, or furlough for 30 days or less. 5 U.S.C. §§ 7512, 7513. In order for a reassignment to fall within the Board's adverse action jurisdiction under 5 U.S.C. chapter 75, it must result in a reduction in grade or a reduction in pay. 5 U.S.C. § 7512(3), (4); *Pann v. Department of the Navy*, 265 F.3d 1346, 1348 (Fed. Cir. 2001); *see Dixon v. U.S. Postal Service*, 64 M.S.P.R. 445, 450 & n.3 (1994), *aff'd sub nom. Scorcia v. U.S. Postal Service*, 77 F.3d 503 (Fed. Cir. 1996) (Table).

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[1] The appellant designated an attorney representative after the record closed on review. PFR File, Tab 6.

[2] We have not considered the appellant's supplements to her petition for review or the agency's response thereto, submitted after the record closed on review, because the appellant has not shown that her supplemental petition was based on evidence not readily available before the record closed. PFRF, Tabs 4-5, 7; *see* 5 C.F.R. § 1201.114(d), (i).

The administrative judge erred in dismissing the appeal without informing the appellant of the elements required to establish Board jurisdiction over her claim of an involuntary reduction in grade or pay.

¶11 The administrative judge correctly found that the appellant offered no evidence or argument to establish the Board has jurisdiction over her appeal as a claim of constructive suspension, ID at 4, and the appellant has not challenged that finding on review. However, the administrative judge erred in finding that the appellant had not alleged any facts or submitted any evidence indicating that she was reduced in grade or pay. *Id*. The appellant, in responding to the show-cause order on jurisdiction, submitted evidence indicating that she accepted reassignment to a limited duty position, allegedly under protest, which resulted in a reduction from a Grade 2 Carrier Technician to a Grade 1 Letter Carrier. IAF, Tab 5 at 5, Subtabs A, C, E, H. The appellant's contentions and supporting documentation were enough to require the administrative judge to notify the appellant of the jurisdictional requirements of a claim that her reassignment resulted in an appealable reduction in grade or pay. *See Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985); *Mills v. U.S. Postal Service*, 106 M.S.P.R. 441, ¶ 7 (2007). On remand, the administrative judge shall give the appellant notice of the jurisdictional requirements for those claims, and allow the parties an opportunity to submit evidence and argument thereon.

¶12 We note that, even if the appellant's reassignment resulted in a reduction in grade or pay as she asserts, a question exists regarding whether her reassignment was a voluntary action outside of the Board's jurisdiction. An employee's acceptance of a lower-graded position is generally considered to be voluntary and not subject to the Board's jurisdiction. *Reed v. U.S. Postal Service*, 99 M.S.P.R. 453, ¶ 12 (2005), *aff'd*, 198 F. App'x 966 (Fed. Cir. 2006). If, however, the employee does not initiate the action, it is not presumed to be voluntary. *Id*. For an action to be "initiated by" the employee, it is not required that the employee first suggest the change; rather, an employee may initiate an action by voluntarily

accepting the agency's proposal. *Id*. The employee's decision to accept the agency's proposal is not involuntary merely because the employee must choose between two unpleasant options. *Id*. For instance, in *Reed*, the Board found that the fact that the appellant faced a choice between the unpleasant alternatives of a demotion or the loss of his OWCP benefits did not render his acceptance involuntary. *Id*., ¶ 14. An appellant may show that an employee-initiated action is involuntary by presenting sufficient evidence to establish that the action was obtained through duress or coercion or showing that a reasonable person would have been misled by the agency. *Id*., ¶ 12. However, an employee cannot establish that an acceptance is involuntary merely by making a written notation that an action was accepted "under duress" or "signed under protest." *Id*., ¶¶ 12, 15.

¶13 Thus, on remand, the administrative judge should inform the appellant of the elements required to establish the Board's jurisdiction over her claim of an involuntary reduction in grade or pay and give the parties the opportunity to present evidence and argument on the issue. The administrative judge shall hold a hearing, if appropriate, and issue a new initial decision regarding these claims.

On remand, the administrative judge should inform the appellant of the elements required to establish Board jurisdiction over her claim under VEOA and the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at 38 U.S.C. §§ 4301-4333) (USERRA).

¶14 VEOA provides redress for preference eligible individuals whose rights have been violated under any statute or regulation relating to veterans' preference. 5 U.S.C. § 3330a(a)(1)(A). If an appellant raises a VEOA claim, she must receive adequate notice regarding her rights and burdens under VEOA before the Board can dismiss the appeal for lack of jurisdiction. *Nahoney v. U.S. Postal Service*, 2009 MSPB 150, ¶¶ 17-18; *Easter v. Department of the Army*, 99 M.S.P.R. 288, ¶ 6 (2005). A VEOA claim should be liberally construed and an allegation, in general terms, that an appellant's veterans' preference rights were violated is sufficient to meet the requirement of a nonfrivolous allegation

establishing Board jurisdiction. *See Elliott v. Department of the Air Force*, 102 M.S.P.R. 364, ¶ 8 (2006). Further, the Board has found that, where an appellant raises VEOA or USERRA as an affirmative defense in an appeal of an adverse action that is either untimely or not within the Board's jurisdiction, the Board should consider the appellant's allegations that an adverse action was taken in violation of USERRA or VEOA as separate claims. *See Nahoney*, 2009 MSPB 150, ¶ 16; *Livingston v. Office of Personnel Management*, 105 M.S.P.R. 314, ¶ 13, *review dismissed*, 226 F. App'x 1001 (Fed. Cir. 2007).

¶15 As noted above, the appellant claimed veterans' preference, alleged that the agency violated veterans' preference laws, and completed the VEOA section of her appeal form. IAF, Tab 1 at 4, 6-7, 12. Nonetheless, in the initial decision, the administrative judge found that the appellant "did not allege that her rights as a preference eligible have been violated." ID at 3. Moreover, the administrative judge dismissed the appeal for lack of jurisdiction without informing the appellant of her burdens and elements of proof under VEOA. We find that the administrative judge erred in failing to apprise the appellant of what is required to establish the Board's jurisdiction under VEOA and accordingly, remand is necessary. *Nahoney*, 2009 MSPB 150, ¶ 18; *Easter*, 99 M.S.P.R. 288, ¶ 6. We note, however, that the veterans' preference rules appear only to apply to hiring and retention during a reduction in force, and there are no allegations of such circumstance here. *See* 5 U.S.C. §§ 3308-3320, 3501-3504; *Livingston*, 105 M.S.P.R. 314, ¶ 15. Further, VEOA does not provide that veterans will be considered eligible for positions for which they are not qualified. *Easter*, 99 M.S.P.R. 288, ¶ 8. However, an appellant need not state a claim upon which relief can be granted for the Board to have jurisdiction over a VEOA claim, and it would be inappropriate to dismiss the appeal for lack of jurisdiction without first apprising the appellant of the jurisdictional elements of a VEOA claim. *Id.*, ¶¶ 6, 8. Therefore, on remand, the administrative judge should provide appropriate jurisdictional notice regarding the appellant's VEOA claim.

¶16 Further, the appellant may have been attempting to raise a USERRA discrimination claim based on her status as a veteran, rather than a VEOA claim. *See Nahoney*, 2009 MSPB 150, ¶ 19 (remanding for further adjudication concerning a potential USERRA claim, even though the appellant never explicitly raised such a claim and only completed sections of the initial appeal form pertaining to VEOA). Accordingly, on remand, the administrative judge should also provide the appellant with adequate notice of what is required to establish Board jurisdiction under USERRA. *Id*.

On remand, the administrative judge should inform the appellant of the elements required to establish jurisdiction over her restoration claim and address that claim in the initial decision.

¶17 Finally, we note that in response to the administrative judge's jurisdictional order, the appellant alleged that the agency's actions violated 5 C.F.R. § 353.301(c), the federal regulation governing the restoration rights of physically disqualified employees, and she attached a copy of the regulation with her filing. IAF, Tab 5 at 5-6, Subtab I. In her petition for review, the appellant asks the Board for restoration to her prior limited duty assignment. PFRF, Tab 1 at 7. The administrative judge did not notify the appellant of the jurisdictional elements of a restoration claim or address the claim in the initial decision. IAF, Tabs 2-3; ID at 2-5. Further, the appellant was not notified in subsequent agency filings as to the proper elements for establishing Board jurisdiction over her restoration claim, which effectively would have cured the administrative judge's error. IAF, Tabs 4, 6; *see Fitzsimmons v. U.S. Postal Service*, 99 M.S.P.R. 1, ¶ 12 (2005). Thus, on remand the administrative judge should provide the appellant with proper jurisdictional notice and address her restoration claim. *See Brehmer v. U.S. Postal Service*, 106 M.S.P.R. 463, ¶ 10 (2007); *Jones v. U.S. Postal Service*, 86 M.S.P.R. 464, ¶¶ 4, 6 (2000).

ORDER

¶18 Accordingly, we REMAND this appeal to the Washington Regional Office for further proceedings consistent with this Opinion and Order.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.